IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 5061 of 1998
with
CIVIL APPLICATION No. 7067 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KACHCHH KALA - Appellant(s)
Versus
NEW KUTCH KALA - Defendant(s)

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Appearance :
MR RR SHAH for Appellant(s) : 1,
MR RC KAKKAD for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 23/11/2005

ORAL JUDGMENT

1. The appellant in this First Appeal was the plaintiff in Civil Suit No.1 of 1995, preferred in the District Court, Kachchh at Bhuj against the

respondent seeking injunction against passing off action by the defendant. The case of the plaintiff is that the plaintiff has been trading under the name of Kachchh Kala for a period of about 7 to 8 years prior to the filing of the suit and has acquired good name, fame and goodwill under that trade name and the defendant, at a later point of time, started dealing in similar business under the name of New Kachchh Kala and, thereby, trying to capitalize out of the words "Kachchh Kala" and, therefore, the defendant may be prevented from doing so. The plaintiff has come out with a case that he came to know about the defendant trading under the name of New Kachchh Kala only in the recent past to the filing of the suit, i.e. somewhere in November 1994. The plaintiff also tendered an application under Order XXX*IX*, Rules 1 and 2 of the Code of Civil Procedure for interim injunction.

2. The defendant came out with an application at Exh.20, contending that the plaint should be rejected under Order VII, Rule 11(d) of the Code of Civil Procedure on the ground that the suit is time barred. It has been the case of the defendant that the plaintiff was aware about the defendant trading under the name of New Kachchh Kala since 1991 as the advertisements produced are of 1991 and the suit, therefore, would be time barred.

3. The learned District Judge, after considering rival side contentions, passed an order on the 16th March, 1995, allowing application

Exh.20 and rejecting the plaint under Order VII, Rule 11(d) of the Code of Civil Procedure as well as disposing of application Exh.5 in light of rejection of the plaint. Aggrieved by the said order, Civil Revision Application was preferred before this Court which, later on, came to be converted into an appeal under Section 96 of the Code of Civil Procedure.

4. Learned Advocate, Mr. Shah, for the appellant submitted that the District Court committed an error in holding that the suit would be time barred as the passing off action was alleged to be continuing and, therefore, the cause of action also would be continuing. Mr. Shah submitted that the passing off action has been held to be a continuing action by the Apex Court in **M/s West Bengal Waterproof Ltd. v. M/s Bombay Waterproof Mfg. Co. & Another, AIR 1997 SC 1398**. Mr. Shah also submitted that the plaint could not have been rejected under Order VII, Rule 11 because that provision has been held to not to include a time barred suit under the Limitation Act, as that is an issue required to be tried by the Court. In support of his contention, he has relied on the decision in the case of **Himanshu Madanlal Shah v. Dr. B. M. Poojari, 2005 (3) GLH 385**. Mr. Shah submitted, therefore, that the appeal may be allowed, the order may be set aside and the District Court may be directed to decide the suit and application Exh.5 on merits.

5. Learned Advocate, Mr. Kakkad, for the respondent submitted that the plaintiff is not the owner of a registered trade mark. In the plaint, he has

averred that he had applied for a trade mark in 1994, but what has happened thereafter is not disclosed by the plaintiff, even up-till-now. Mr. Kakkad submitted that there is variance between pleading and evidence of the plaintiff when in the pleading, i.e. the plaint, the plaintiff says that he came to know about the passing off action of the defendant in 1994, whereas the advertisements that the plaintiff has produced are of 1991 and the District Court was, therefore, justified in passing the order. Mr. Kakkad, therefore, submitted that the appeal may be dismissed.

6. The first question that arises for determination by this Court is whether in a passing off action, the cause of action would continue to arise if the alleged action continues. The second question that arises for determination would be whether the plaint could have been rejected by the Trial Court under Order VII, Rule 11(d) of the Code of Civil Procedure.

7. The case of the plaintiff has been that the plaintiff has been trading under the name of Kachchh Kala for a period of about seven to eight years prior to the filing of the suit and that the said trade name has acquired name, fame and goodwill. It has also been the case of the plaintiff that the defendant, with a view to taking undue advantage of the goodwill acquired by the trade name Kachchh Kala, has started business of similar products in the name of New Kachchh Kala and, therefore, he may be prevented from doing so. It is not the case of the plaintiff that he is the owner of a registered trade

mark. Therefore, it is not a case of infringement of trade mark but a case of passing off action. Resultantly, the contention of Mr. Kakkad that the plaintiff is not the owner of the trade mark, that he has applied for trade mark in 1994 and what has happened thereafter is not disclosed would not be of much significance so far as this appeal is concerned.

8. The case of the plaintiff has been that he, in the recent past to the filing of the suit, came to know about the defendant's action somewhere in November 1994 and, therefore, he filed the suit. It is the case of the plaintiff that the defendant has been trading under the name of New Kachchh Kala in respect of similar goods or articles. The said allegation is not denied by the defendant nor it is the case that the defendant was, at one stage, doing business under the trade name of Kachchh Kala and now that is stopped. Therefore, when the suit was filed, the alleged act of passing off is alleged to be in continuance. In such a situation, the District Court ran into an error in holding that the suit was time barred. The passing off action is under the common law and if provision contained in Section 22 of the Limitation Act is considered, it would be a case of continuing breach. The section provides that in case of continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or tort, as the case may be, continues. Passing off action is in the form of civil wrong or a tort and, therefore, a fresh period of limitation would begin as long as the alleged act continues. The Apex Court has also taken same view in the case of **M/s**

Bengal Waterproof Limited v. M/s Bombay Waterproof Mfg. Co. (supra) where, in paragraph 8, Their Lordships have observed : *"As act of passing off is an act of deceit and tort every time when such tortious act or deceit is committed by the defendant the plaintiff gets a fresh cause of action to come to the Court by appropriate proceedings."*

9. The next question that requires consideration is whether a plaint could have been rejected under Order VII, Rule 11(d) of the Code of Civil Procedure. Order VII, Rule 11(d) can be read thus :-

> *"11. Rejection of plaint:- The plaint shall be rejected in the following cases :-*
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> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) whether the suit appears from the statement in the plaint to be barred by any law;"*

10. The words "barred by any law" are interpreted by a Division Bench of this Court in the case of **Himanshu Madanlal Shah v. Dr. B. M. Poojari, 2005(3) G.L.H. 385**. It has been held that these words referred to a an eventuality where suit is not maintainable at all. Question of limitation is to be decided as an issue and will not take away jurisdiction of the Court and in such a situation, the Court would be required to cast issue and decide the

matter on merits. Thus the District Court could not have rejected the plaint under Order VII, Rule 11(d) of the Code of Civil Procedure on this count as well.

11. The appeal has to be allowed and is allowed. The order impugned herein by the District Judge below Exh.20 rejecting the plaint is hereby set aside and the District is directed to entertain the suit and decide the same on merits including application under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure. There shall be no order as to costs.

12. Record and proceedings to be transmitted to the District Court forthwith.

13. In view of the disposal of the appeal, no order on Civil Application No.7067 of 1999.

[A. L. DAVE, J.]

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